A **BANDAR NUSAJAYA DEVELOPMENT SDN BHD**

**v.**

**MAJLIS MESYUARAT KERAJAAN NEGERI JOHOR & ORS**

B

HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[JUDICIAL REVIEW NO: 25-145-12-2012]
26 MARCH 2014

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***ADMINISTRATIVE LAW:*** *Judicial review - Application for - Application to quash decision of payable compensation - Whether amenable to judicial review - Whether State Executive Council's (EXCO) decision conflicted with final decision - Whether EXCO acted in accordance with*
D *law and within its jurisdiction - Whether decision made under s. 16(2) Electricity Supply Act 1960 final - Whether EXCO had power to review and alter its own decision - Whether functus officio - Whether decision valid and had legal effect - Whether order of certiorari issued - Rules of Court 2012, O. 53*

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***CIVIL PROCEDURE:*** *Jurisdiction - Proceedings - Judicial review proceedings - Whether court's jurisdiction in judicial review proceedings extend to future or anticipated decisions - Whether person making application must be adversely affected by decision, act or omission in*
F *relation to exercise of public duty and function - Rules of Court 2012, O. 53 r. 2(4)*

The applicant was the owner of 26 parcels of land in the State of Johor ('the lots'). The proposed transmission line project by Tenaga Nasional Berhad ('TNB') included construction of
G electrical installations over the lots owned by the applicant pursuant to the Electricity Supply Act 1960 ('ESA'). Pursuant to an inquiry held under s. 11(6) of the ESA, the land administrator/ second respondent ('LA') assessed the total compensation to be paid by TNB to the applicant for the encroachment into its land
H under s. 16(1) of the ESA at RM11,426,555.75. Dissatisfied, the applicant invoked ss. 11(7) and 16(2) of the ESA and applied to the state authority/first respondent ('EXCO') to review the award of the LA. The EXCO *via* its decision ('first decision) increased the compensation payable by TNB to the applicant from
I approximately RM11.4 million awarded by the LA to RM34,522,099. The second respondent duly reminded TNB to satisfy payment of the additional compensation as per the EXCO's

decision. TNB, however, without any formal notice or copy to the applicant, appealed to the EXCO to revise its award/first decision, which was purportedly allowed wherein the increase in the award of the LA was revised to a mere 30% which required TNB to merely pay additional compensation of only RM2,735,613 ('second decision'). The applicant wrote to the LA notifying him that TNB had yet to settle the additional compensation and asking that the EXCO's first decision be maintained. In response, the EXCO reverted to its first decision and declared it to be final and the second decision to be nullified and of no effect ('third decision'). TNB then applied for judicial review against the EXCO's third decision and succeeded at the High Court in obtaining an order of *certiorari* to quash this decision. Dissatisfied, the applicant appealed to the Court of Appeal. Whilst pending the outcome of the Court of Appeal proceedings, the applicant was informed by the LA that the EXCO intended to maintain its second decision. This was referred to by the applicant as the fourth decision which was the impugned decision in the present *certiorari* proceedings. Notwithstanding the fourth decision by the EXCO, the Court of Appeal reversed the High Court decision in favour of the applicant thereby affirming the EXCO's first decision. This was an application for a judicial review to quash the EXCO's fourth decision and to declare it null and void. The thrust of the applicant's case was that any decision made under s. 16(2) of the ESA is final without any proviso in the governing Act for further review. Accordingly, the applicant contended that the EXCO's first decision was final and any subsequent decision that was inconsistent with the first decision was null and void. TNB, on the other hand, contended that there was no decision by the EXCO that was amenable to judicial review.

**Held (quashing EXCO's impugned decision):**

**(1)** The EXCO had made the impugned or fourth decision on the compensation to be awarded to the applicant in respect of the present project payable by TNB and had conveyed it in writing. Despite there being apparently nothing left at that stage for the EXCO to decide based on the finding and subsisting order of the High Court on TNB's judicial review application, it did not detract from the fact that on record, the EXCO made the impugned decision. The letter of the LA dated 20 September 2012 itself on the face of it, is evidence of a decision of the EXCO having been communicated to the

applicant. The above facts fell squarely within the ambit of the relevant provisions of O. 53 Rules of Court 2012 ('ROC') for reliefs to be sought in an application for judicial review. (para 13)

**(2)** It could not be gainsaid that the letter of 20 September 2012 referred explicitly to a decision of the EXCO, the meaning of which was plain and obvious without any hint of vagueness. The letter stated unequivocally that the EXCO had made a decision at its meeting on 18 July 2012 to dismiss the appeal or application objecting to the award of compensation and to maintain the decision of the Government. Notwithstanding that there was then no appeal or application for the EXCO to decide, there was a decision made that was subject to judicial review, the correctness or basis of which was the very subject of this proceedings. The contention that the fourth decision of the EXCO, on which this judicial review application was premised, was non-existent and not reviewable, therefore, failed. (para 18)

**(3)** As the EXCO had exercised the powers vested in it under s. 16(2) of the ESA on the appeal against the District LA's assessment and had made a final decision, it had acted contrary to law and exceeded its jurisdiction in readjudicating the matter and making the fourth decision that conflicted with its final decision. More so, as the dispute as to its third decision, which was the subject of judicial review, was pending decision before the Court of Appeal at that point in time. The EXCO was thus *functus officio* upon having heard the appeal and delivered its decision in the exercise of its quasi-judicial powers. It had no powers to review its own decision and alter it thereafter. It had therefore committed an error of law that went to jurisdiction in subsequently reconsidering the matter and making a contrary decision. The EXCO had erred by acting in contravention of s. 16(2) of the ESA and as a consequence, the impugned decision was invalid and of no legal effect. Thus, an order of *certiorari* was issued to have it quashed. (para 21)

**(4)** With regard to prayer (ii) of the applicant's originating summons where it sought to declare void and nullify any decision that may be made by the EXCO in the future, the relief sought was a pre-emptive order and should not be made in a judicial review of the decision of an administrative or

executive authority. The court's jurisdiction in judicial review proceedings does not extend to future or anticipated decisions of the executive authority which could not be restrained from exercising the decision making powers vested in it under the law. The ambit of O. 53 of the ROC, which governs judicial review applications, is crystal clear as stipulated in O. 53 r. 2(4) that for a person to be qualified to make the application, he must be adversely affected by the decision, act or omission in relation to the exercise of the public duty or function. (para 24)

**Case(s) referred to:**

*Amyerma Zakaria lwn. Pentadbir Tanah Daerah Batu Pahat & Yang Lain [2012] 1 LNS 406 HC* ***(dist)***

*Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC* ***(refd)***

*Ismail Abdullah v. Tenaga Nasional Bhd [2011] 3 CLJ 770 CA* ***(refd)***

*M & W Zander (M) Sdn Bhd v. Director General of Inland Revenue [2005] 6 CLJ 336* ***(dist)***

*R v. Sloan [1990] 1 NZLR 474* ***(dist)***

*Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 CLJ 748 CA* ***(refd)***

**Legislation referred to:**

Electricity Supply Act 1960, ss. 11(6), (7), 16(1), (2)

Rules of Court 2012, O. 53 rr. 2(4), 3(6)

*For the applicant - MW Lim; M/s Zain & Co*

*For the 1st & 2nd respondents - Shahrizal Shaari (Anis Wahidah Mohamad with him) State Legal Advisor, Johor*

*For the 3rd respondent - Azlan Sulaiman (Amirul Izzat Hasri with him); M/s Azmi & Assocs*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Gunalan Muniandy JC:**

**[1]** This application for judicial review arises out of a decision dated 18 July 2012 by the Johor State Executive Council/first respondent ('EXCO') pertaining to a Tenaga Nasional Berhad ('TNB') Electrical Transmission Line project in Gelang Patah, Johor ('the project'). The applicant sought an order of *certiorari* to

quash the decision of the EXCO ('the fourth decision') and a declaration that the said fourth decision and all other decisions of the EXCO pertaining to the project were erroneous, unlawful, illegitimate and void *ab initio*.

## Factual Background

**[2]** In order to appreciate the orders prayed for, it is important to be appraised of the chronological background that led to the present application.

**[3]** The applicant was the owner of 26 parcels of land in the state of Johor ('the lots'). TNB's proposed transmission line project included construction of electrical installations – transmission towers and cables – over the lots owned by the applicant pursuant to the Electricity Supply Act 1960 ('ESA'). Pursuant to an inquiry held under s. 11(6) of the ESA on 17 October 1995 and 17 June 1997 the Land Administrator/ second respondent ('LA') assessed the total compensation to be paid by TNB to the applicant for the encroachment into its land under s. 16(1), ESA at RM11,426,555.75. Both the affected parties attended the inquiry before the LA and were afforded an opportunity to be heard.

**[4]** Being dissatisfied with the award of the LA, the applicant invoked s. 11(7) and s. 16(2), ESA and applied to the state authority ('EXCO') to review the award of the LA. *Vide* a letter dated 8 January 2001, the LA invited TNB to put forward evidence and/or a supplementary valuation report for consideration in the applicants appeal to the EXCO. Upon consideration of the applicants appeal the EXCO *via* its decision delivered on 6 February 2002 ('the first decision') increased the compensation payable by TNB to the applicant from approximately by RM11.4 million awarded by the LA to RM34,522,099. This decision by the EXCO was not challenged by TNB as no application for judicial review was filed to quash the award.

**[5]** *Vide* letters dated 28 April 2002, 30 May 2002, 28 June 2002, 3 September 2002, 11 June 2003 and 11 February 2004, the second respondent duly reminded TNB to satisfy payment of the additional compensation as per the decision of the EXCO. In the letters, TNB was also warned that the non-satisfaction of the additional award amounted to a contravention of the EXCO's decision and could result in legal action being commenced and a penalty being imposed. TNB, however, did not respond positively

to the reminder but instead, *vide* its letter dated 14 August 2002, without any formal notice or copy to the applicant, appealed to the EXCO to revise its award/first decision. The appeal was purportedly allowed by the EXCO *vide* letter dated 2 April 2008 (reference R/M Bil 539/2008) wherein the increase in the award of the LA as decided on 6 February 2002 to was revised to a mere 30 per cent which required TNB to merely pay additional compensation of only RM2,735,613 ('the second decision').

**[6]** After the second decision or revised award, the applicant wrote to the LA on 6 July 2009 notifying him that TNB had yet to settle the additional compensation and asking that the EXCO's first decision be maintained. In response, the EXCO then reverted to its first decision for TNB to pay the applicant a total compensation of about RM34.5 million and declared the first decision to be final ('muktamad') and the second decision to be nullified and of no effect ('tidak terpakai dan terbatal') *vide* notification bearing reference R/M 1351/2009 dated 26 October 2009 ('the third decision'). Consequently, TNB was liable to pay the applicant the original compensation of about RM34.5 million.

**[7]** TNB then applied for judicial review against the EXCO's third decision and succeeded at the High Court in obtaining an order of *certiorari* to quash this decision. Dissatisfied with the High Court decision, the applicant appealed to the Court of Appeal *vide* Civil Appeal No: J-02-2698-11-2011. The EXCO's second decision was brought to the notice of the applicant only when the cause papers of TNB's judicial review application was served on it.

**[8]** Whilst pending the outcome of the Court of Appeal proceedings, the applicant received a letter dated 20 September 2012 from the LA informing that the EXCO intended to maintain its second decision. This was referred to by the applicant as the fourth decision which was the impugned decision in the present *certiorari* proceedings. No further inquiry/inquest was held by the EXCO before the impugned decision. Notwithstanding the fourth decision by the EXCO, the Court of Appeal reversed the High Court decision in favour of the applicant thereby affirming the EXCO's first decision.

**[9]** Despite the Court of Appeal's decision in the applicant's favour ordering TNB to pay the original compensation awarded in the sum of about RM34.5 million, this judicial review proceedings was instituted to quash the EXCO's fourth decision and to declare it null and void.

A **Contentions Of The Parties**

**[10]** The thrust of the applicant's case was that any decision made under s. 16(2) ESA is final without any proviso in the governing Act for further review. Accordingly, the applicant
B contended that the EXCO's first decision was final and any subsequent decision that was inconsistent with the first decision was null and void. On that score, the EXCO's fourth decision, which is the subject of this judicial review, was rendered null and void.

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**[11]** TNB, on the other hand, contended that there was no decision by the EXCO on 18 July 2012 that was amenable to judicial review. It was further contended that in every judicial review application the onus was on the applicant to prove that there was a decision that was judicially reviewable by the court.
D In support, the case of *R v. Sloan* [1990] 1 NZLR 474 was cited where Hardie Boys J (at p. 479) remarked:

> It is not every decision made by statutory authority that is subject to review. A decision must go beyond what is merely
E administrative or procedural.

(See also *Amyerma Zakaria lwn. Pentadbir Tanah Daerah Batu Pahat dan Yang Lain* [2012] 1 LNS 406 where *R v. Sloan* was applied).

**[12]** The basis of TNB's contention was, *inter alia*, that as at 18
F July 2012 its judicial review application against the order/decision (the third decision) of the LA to enforce the EXCO's first decision had been allowed by the High Court whilst the applicants appeal to the Court of Appeal had yet to be heard. Hence, the operative and binding decision as at that date was the revised award dated
G 2 April 2008 or the second decision. As the High Court order was than effective and enforceable on the matter in dispute, not having been set aside on appeal, there was actually nothing left as it stood for the EXCO to decide. Therefore, the letter of the LA conveying the purported decision of the EXCO on 18 July 2012
H was at best to convey the stand of the EXCO that it was maintaining and reaffirming its revised award made on 2 April 2008 which is clear from the conclusion of the letter that makes reference to the aforesaid award. Moreover, the LA's letter appears to be in response to a 'permohonan' or 'rayuan
I permohonan bantahan pemberian pampasan, from the applicant whereas at the material time there was no appeal by the applicant and it followed that there could be no basis for the decision.

## Analysis And Finding

**[13]** First and foremost, from the record, it is indisputable that the EXCO/first respondent made the impugned or fourth decision on 18 July 2012 on the compensation to be awarded to the applicant in respect of the present project payable by TNB. As the decision was conveyed to the applicant in writing *vide* the relevant letter issued by the LA, it was for TNB to show to the contrary. Despite there being apparently nothing left at that stage for the EXCO to decide based on the binding and subsisting order of the High Court on TNB's judicial review application, it did not detract from the fact that on record the EXCO made the impugned decision. The letter of the LA dated 20 September 2012 itself on the face of it is evidence of a decision of the EXCO having been communicated to the applicant as it expressly states 'Keputusan Majlis Mesyuarat Kerajaan …'. In the face of the clear and explicit words of the said letter communicating the impugned decision to the applicant, the onus was on TNB to prove otherwise that no fourth decision was made by the EXCO in the exercise of its public duty.

**[14]** The above facts fall squarely within the ambit of the relevant provisions of O. 53 Rules of Court 2012 ('ROC') for reliefs to be sought in an application for judicial review. Order 53 r. 2(4) provides that:

> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Order 53 r. 3(6) states that:

> (6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant.

Giving the word decision its plain and ordinary meaning there was in this case clearly a decision made in the exercise of a public duty or function that was duly communicated to the applicant.

**[15]** The applicant rightly pointed out that the cases cited by TNB in support of its contention were distinguishable on the facts. In *R v. Sloan (supra)* which concerned the Gaming and Lotteries Act 1977 the authority concerned was not empowered

by the Act to make a decision but merely to form an opinion and institute the necessary procedures for the court to make a decision. It was held that forming an opinion of this kind was manifestly not reviewable as it plainly did not constitute a decision. In *Amyerma Zakaria v. PTD Batu Pahat dan Yang Lain (supra)*, the Land Administrator merely implemented an order issued by the Court of Appeal directing that the charge be registered and did not make his own decision. In the instant case, on the contrary, power was vested in the EXCO under s. 16(2) ESA to make a decision and it was in fact the final arbiter of compensation.

**[16]** Similarly in *M & W Zander (M) Sdn Bhd v. Director General of Inland Revenue* [2005] 6 CLJ 336, the purported 'decision' merely involved on "indication by officers of the IR Board as to how they compute .... chargeable income". The High Court in giving 'decision' its plain and ordinary meaning to avoid absurdity that would result in unfairness rightly held that it could not amount to a decision that was judicially reviewable. Taking this approach as correctly adopted, the impugned decision was for all intents and purpose a decision made by the EXCO pursuant to its statutory powers and not merely an administrative act.

**[17]** Coming now to TNB's contention that the EXCO's fourth decision was superfluous as TNB's JR application against its third decision was allowed by the High Court whose decision was then still pending appeal, the reasoning was in my view flawed and untenable. Going by TNB's argument, the first decision of the EXCO made upon proper adjudication of the applicant's appeal against the LA's award under s. 16(2), ESA should prevail and all subsequent decisions including the revised award *via* the second decision should likewise be negated and disregarded. However, TNB did not adopt the stand that the second decision of the EXCO which was in its favour should be invalidated by the existence of the EXCO's first decision which was made in accordance with law that rendered it final. Moreover, the EXCO's second decision was overturned by the Court of Appeal and thus, rendered nugatory and of no effect.

**[18]** On TNB's contention that as there was no application or appeal by the applicant for the EXCO to make a decision on 18 July 2012 there was, thus no proper decision made that was reviewable. The contents of the letter dated 20 September 2012 communicating the decision ought to be construed in resolving this

issue. It cannot be gainsaid that the letter refers explicitly to a 'keputusan' or decision of the EXCO, the meaning of which is plain and obvious without any hint of vagueness. The letter states unequivocally that the EXCO had made a decision at its meeting on 18 July 2012 bearing reference 'Ringkasan Mesyuarat Bil 1567/2012' to dismiss the appeal or application objecting to the award of compensation and to maintain the decision of the Government made on 2 April 2008 at the meeting Bil. 539/2008 (second decision). Notwithstanding that there was then no appeal or application for the EXCO to decide, there was a decision made that was subject to judicial review, the correctness or basis of which was the very subject of this proceedings. The contention that the fourth decision of the EXCO, on which this judicial review application is premised, was non-existent and not reviewable, therefore, fails.

**[19]** The impugned decision was clearly in contravention of s. 16(2), ESA which states in clear and unequivocal terms that the decision of the state authority on an appeal from the LA's assessment shall be final. Section 16(2) provides that:

> (2) Any person aggrieved with the District Land Administrator's assessment may within twenty-one days after the assessment appeal to the State Authority whose decision shall be final.

According to the words of s. 16(2) given their plain and ordinary meaning and a mandatory interpretation, the finality of the state authority's decision therein is beyond dispute. In the Court of Appeal case of *Ismail Abdullah v. Tenaga Nasional Bhd* [2011] 3 CLJ 770 which also concerned s. 16(2), ESA arising out of an appeal from an assessment by the Deputy Land Administrator to the State Authority of Kedah, the court held:

> A mandatory interpretation must be accorded to the word "shall" that appears in section 16(2) of the Electricity Supply Act 1990.

Further, that:

> … Here, we have s. 16(2) of the Electricity Supply Act 1990 which states that the decision of the State Authority shall be final and effect must be given to it. Public policy too demands that finality to the decision of the State Authority be recognised.

**[20]** The Court of Appeal went on to hold that the finality of the decision of the state authority under s. 16(2) rendered it non-reviewable by the court as follows:

> In holding that the award by the MMK was excessive, the learned JC was indirectly reviewing the decision of the MMK. In our judgment, the learned JC has no power to do so. This is another instance where his Lordship erred … The learned JC relied on the valuation report of the respondent and held that the award by the MMK was excessive. But the Electricity Supply Act 1990 does not make any provision for an award by the MMK to be challenged since the MMK's decision is final.

**[21]** As the EXCO had exercised the powers vested in it under s. 16(2), ESA on the appeal against the District LA's assessment and made a final decision on 6 February 2002, it had acted contrary to law and exceeded its jurisdiction in readjudicating the matter and making the fourth ('impugned') decision on 18 July 2012 that conflicted with its final decision. More so, as the dispute as to its third decision, which was the subject of judicial review, was pending decision before the Court of Appeal at that point in time.

Having accorded a mandatory interpretation to s. 16(2), ESA, I held that the EXCO was *functus officio* upon having heard the appeal and delivered its decision in the exercise of its quasi-judicial powers. It had no powers to review its own decision and alter it thereafter. It had therefore, committed an error of law that went to jurisdiction in subsequently reconsidering the matter and making a contrary decision.

## Conclusion

**[22]** It is trite law that a decision-making authority exercising a quasi-judicial function has no jurisdiction to commit an error of law or contravene the law from which it derives its decision-making powers. The principle was expressed by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687 where the following passage from *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748 was cited with approval:

> An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law.

> Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-maker does make such an error of law then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 CLJ 619), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
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> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

**[23]** For the aforesaid reasons, I concluded that by making the impugned decision, the EXCO had committed a serious error of law by acting in contravention of s. 16(2), ESA which was the law from which its decision-making powers were derived. As a consequence, the impugned decision was invalid and of no legal effect. I, accordingly, made the declaration that the decision was null and void *ab initio* and issued an order of *certiorari* to have it quashed. I also awarded costs of RM15,000 to the applicant and damages to be assessed by the Registrar.

**[24]** With regard to prayer (ii) of the applicants originating summons where it seeks to declare void and nullify any decision that may be made by the first respondent ('EXCO') in the future and not one that has already been made, I found merit in TNB's contention that the relief sought was a pre-emptive order that should not be made in a judicial review of the decision of an administrative or executive authority. It clearly did not fall within the scope of a judicial review application as envisaged in O. 53 r. 2(4), ROC 2012 and ran counter to the purpose or intent of O. 53. To be judicially reviewable in proceedings for *certiorari* and/or declaration, there must be an actual existing decision complained of that the applicant wishes to challenge and not one that is anticipated would be made in the future. In this prayer, the applicant also seeks to prohibit any future decision of the EXCO that conflicts with the effect of its first decision that is final and conclusive. This is not only vague but speculative in nature

A as well and as argued by TNB the question of conflict alluded to is a matter of judicial interpretation as and when the occasion arises when a new decision is made and a fresh challenge mounted. In short, the court's jurisdiction in judicial review proceedings does not extend to future or anticipated decisions of
B the executive authority which cannot be restrained from exercising the decision-making powers vested in it under the law. The ambit of O. 53 ROC which governs judicial review applications is crystal clear as stipulated in O. 53 r. 2(4) that for a person to be qualified to make the application he must be adversely affected by the
C decision, act or omission in relation to the exercise of the public duty or function. It certainly doesn't encompass any future or anticipated decision, act or omission by the authority concerned. In the circumstances, I dismissed the application for the reliefs sought in prayers 1(ii) and 2 to invalidate any future decision of
D the first respondent referred to therein and to restrain it from exercising its decision making powers.

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